Universal Syndications, Inc. *and* Maggie Engelhart.
Case 8-CA–35901

July 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On April 10, 2006, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 28, 2006

Robert J. Battista , Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Steven Wilson, Esq., for the General Counsel.
Todd T. Morrow, Esq., of Canton, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Cleveland, Ohio, on December 8–9, 2005. The charge was filed by Maggie Engelhart on June 7, 2005; the first amended charge was filed August 29, 2005; and the complaint was issued August 31, 2005.[1] The complaint alleges that the Respondent, Universal Syndications, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening adverse action if employees discussed certain conditions of employment with other employees, subjected an employee to surveillance because the employee engaged in protected concerted activity, and subsequently terminated that employee for engaging in such activity. In its answer to the complaint, the Respondent denies it violated the Act and further attributes its actions to the Charging Party's culpable conduct.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, with an office and place of business in Canton, Ohio, is a distributor of numismatic and religious collectibles. Annually, the Respondent sells and ships from its Canton facility goods valued in excess of $50,000 directly to points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

This case involves the Respondent's alleged treatment of Maggie Engelhart, the Charging Party, after she complained about a security guard allegedly stealing employees' pizza tip money. Engelhart contends that, as a result of those complaints, the Respondent's management staff uttered coercive statements compelling her to stop complaining, placed her under surveillance, and denied her request for a leave of absence in June 2005.

The Respondent, a 3-year old company engaged in the distribution of numismatic coins, letters, and other collectibles, employs approximately 300 workers. It coexists at its Canton facility with an affiliated company, Patent Health. The Respondent and Patent Health intermingle operations and personnel. None of the Respondent's employees are represented by a union.

Engelhart worked for the Respondent as a part-time packer from August 22, 2004, to May 23, 2005. During Engelhart's employment by the Respondent, she was consistently described as an excellent worker in performance evaluations. While talking was permitted during worktime, Engelhart had a proclivity for loud and crude language that was sometimes offensive to others in her work area. In performance evaluations, Engelhart commented on her penchant for talking, her opinionated nature, the need to "try to have fun at my job a little quieter," the need to "convince management that I may have a loud mouth but my work is excellent," and trying "not to irritate others with my bubblyness." Gail Lynch, her supervisor, recommended that Engelhart do "less talking so more work gets done" and coworkers were "not distracted and doing less work," noted that Engelhart's "inappropriate talk in the work place makes some coworkers uncomfortable and distracted from doing their job

[1] All dates are from August 2004 to July 2005 unless otherwise indicated.

efficiently," and commended Engelhart for "doing much better at controlling yourself and your conversations." Engelhart was also counseled on several occasions, although none of those instances involved conduct or speech outside her work area.[2] Due to her quirky behavior, Engelhart's work location was moved several times so she could work alone.[3]

The Pizza Tip Controversy

The Respondent's employees get an unpaid 1/2 hour lunchbreak and have the option of going out to eat or eating lunch in the facility. Employees who eat lunch in the facility frequently have their lunch delivered there. Occasionally, certain employees, including Engelhart, would place a group order for pizza delivery (the pizza group). The pizza group members typically gave their order and money to Ira Hemingway, a security guard employed by United National Security Company, the Respondent's security contractor. Hemingway volunteered to place the orders, receive them in the reception area, and pay the pizza delivery person. Each employee participating in the pizza group would also include a 50-cent tip for the pizza delivery person.[4]

On one occasion, in late March or early April, the pizza group placed an order with Fox Pizza. The pizza delivery was late, however, causing some of the employees to resume work without having eaten anything. Later that afternoon, Elaine Reitz, an employee who participated in the pizza group that day, visited Fox Pizza. Some employees were angry and wanted a refund. The owner refused a refund and added that his drivers never received tips for deliveries made to the Respondent's facility. Aware that employees typically provided Hemmingway with tip money, Reitz immediately suspected Hemmingway was keeping the tip money instead of giving it to the pizza delivery person. Reitz called Engelhart at home later that day and told her what she learned at Fox Pizza.[5]

The following day, Reitz met with Mark Craig, the Respondent's director of human resources, to pass along her discussion with Fox Pizza's owner. Craig thanked her for sharing the information and promised to look into the situation.[6] After his meeting with Reitz, Craig asked Timothy Mendenhall, the director of fulfillment, to question Hemingway about the pizza tip incident. Mendenhall spoke to Hemingway, who denied the accusation. Hemmingway explained that he was already aware that Reitz and Engelhart accused him of misappropriating the tip money. He also claimed that they were passing around rumors about him to other employees, including one that Hemmingway was having an affair with one of the Respondent's employees.[7] Hemingway denied the rumors and Mendenhall asked him to stop placing food orders. Hemingway agreed. Neither Craig nor Mendenhall ever contacted Fox Pizza to confirm the allegations.[8] Craig did, however, speak with the Respondent's receptionist, Jennifer Rodriguez, because food deliveries are placed on her desk. Rodriguez told Craig that she would hear Hemmingway count money out loud and then say that "this is for you."[9]

Over the course of the next 2 days, Englehart and Reitz discussed the matter with coworkers in the coin vault and, during breaktime, in other parts of the facility. They provided coworkers with Fox Pizza's telephone number and urged them to call. To the extent that the conversations occurred during worktime, this was not unusual at the Respondent's facility.[10] However, several coin vault employees, including Sara Zeno, Martha Smith, and Chrissy Snyder, complained to Lynch that the discussion was distracting them from their work. Lynch passed that along to Wendell. Wendell then told Mendenhall. However, rather than speak with Reitz and Engelhart about the matter, Mendenhall told Wendell to have Engelhart and Reitz go meet with Craig.[11]

Craig's Statements Regarding the Pizza Tip Issue

Mendenhall called Craig and told him he was sending Engelhart and Reitz to meet with him to be counseled regarding the pizza tip incident. Mendenhall told Craig that discussion over the pizza tip incident was disrupting operations.[12] The meeting

[2] Lynch provided a candid, credible assessment of Engelhart's work performance, which Engelhart did not rebut. Tr. 351–352. However, contrary to the Respondent's assertion, there is no documented proof that she would use such language outside her work area.

[3] This testimony by Donna Wendell, coin vault supervisor, and Mark Craig, human resources director, was not disputed. Tr. 377–378, 408–409.

[4] It is not disputed that the Respondent did not require Hemingway to perform this service and that he volunteered to do it. Tr. 26–28, 51–52, 236–237, 421–423, 434–435, 521.

[5] I base this finding on Reitz' credible and uncontested testimony. Her testimony was consistent throughout, and she provided spontaneous responses to fairly contentious cross-examination questions. Tr. 28–33.

[6] Reitz and Craig provided fairly consistent testimony regarding this conversation. Tr. 33–34, 434–435.

[7] The Respondent noted that it was precluded at trial "from addressing other rumors and allegations that Engelhart was spreading about Hemingway." R. Br. at 7. The Respondent predicated its proffer on the assertion that Engelhart was engaged in a vendetta against Hemingway which, if true, meant that she was not engaging in "mutual aid or protection" within the meaning of the Act. Tr. 12, 397–400, 423–427. The Respondent's focus on Engelhart's motivation is misplaced. It is undisputed that Engelhart complained that Hemingway stole pizza tip money and that the Respondent responded to such speech in the workplace. As there is no proof that the Respondent addressed other rumors, Engelhart's speech regarding the pizza tip incident is the only issue—not a salacious inquiry into a "Day of Our Lives" at the Respondent's workplace.

[8] It appears that Mendenhall spoke with Hemmingway, was satisfied with his response, and did no further investigation. Tr. 235–237, 423–426.

[9] Reitz acknowledged hearing a "rumor" that Rodriguez told Craig that she heard Hemmingway give a tip to the delivery person. Tr. 66. That was sufficient to at least corroborate Craig's hearsay testimony that Rodriguez told him she heard Hemmingway count money and then say something to the effect that "this is for you." Tr. 435–437.

[10] Sara Zeno, the only employee to testify for the Respondent, confirmed their assertion that it was common for employees to talk while working. Tr. 32–36, 101–103, 177–178, 408–409.

[11] I base this finding on consistent and credible testimony of Lynch, Zeno, and Wendell. Engelhart's coworkers, including Zeno, Martha Smith, and Chrissy Snyder, were threatening to move their workstations away from Engelhart if she did not stop bothering them. Tr. 233–235, 265–268, 358–359, 364–365, 393–396.

[12] This meeting was held solely at Mendenhall's request. Tr. 234. I did not credit Craig's uncorroborated double hearsay testimony that

in Craig's office lasted approximately 5 minutes. Craig began the meeting by telling Reitz that they previously discussed the issue and he told her that he would handle the situation. Reitz concurred but explained that she had not heard from him. Then Craig looked at Engelhart and asked why she was passing out the telephone number for Fox Pizza. Engelhart began to explain and Craig accused her of having a bad attitude. Craig then issued a verbal warning directing Engelhart and Reitz to stop discussing the pizza tip incident or face termination.[13] Reitz and Engelhart agreed that "there would never be another word said as long as they were working, about the pizza thing." At that point, the meeting broke up, and Engelhart and Reitz returned to work.[14]

The Respondent's Surveillance of Engelhart

After the meeting with Craig and Wendell (the Craig meeting), there were no more complaints that Engelhart and Reitz engaged in disruptive behavior.[15] Nevertheless, over a period of 1 to 2 weeks after his meeting with Engelhart and Reitz, Craig visited the warehouse area where the packers worked. Reitz was still working in the coin vault where Lynch also worked. However, Engelhart was stationed at a desk outside the coin vault area. Craig would open the door to the area and stare at Engelhart for about a minute. This contrasted with his practice before the meeting of hardly ever visiting that area and was motivated by the pizza tip incident discussion. In addition, after the Craig meeting, Mendenhall frequently came out of his office to tell employees, including Engelhart and Reitz, that they were talking too loud. He also observed Engelhart on several occasions when she left her work area and walked to other areas in the warehouse. This behavior also contrasted with past practice and was motivated by the pizza tip discussion.[16]

Engelhart's Request for a 1-Month Long Vacation

June is typically a month when many of the Respondent's full-time employees take vacation. Falling in the summer, it is also a high-volume production month. June 2005 was unusual, however, because the Respondent was in the process of moving its operations to a new facility that summer—a fact the Respondent's managers and administrative staff knew, or had reason to know, in May. As a result, during the first half of June, part-timers worked only a few days a week. By June 22, the part-time employees were placed on leave and told to return on July 5 after completion of the facility move.[17]

When she was hired, Engelhart told Lynch about her custom of going to Colorado for a month every summer. Lynch did not see a problem with it at the time.[18] In addition, in her comments on her first performance review, dated September 24, Engelhart responded to the question asking what was "the highest payoff thing you did this month" by answering: "Being able to spend another month with my husband and family." Lynch signed the evaluation.

However, while Engelhart periodically mentioned her desire for 1 month off in the summer to other employees, including Reitz, she did not ask Lynch about it again until the end of April or beginning of May.[19] In written comments on her April performance review, Engelhart stated that it was her goal to "convince management how unfair they are being about my leave when others have been able to take one." The document was apparently generated in early May, since Lynch signed it on May 10.[20] It was referring to a conversation during the week

Seery and Schilling allegedly called him to complain that Engelhart and Reitz were disrupting operations in their departments. First, neither Schilling nor Seely were called to testify. Second, Engelhart and Reitz credibly testified that these conversations occurred during breaks. Tr. 35, 63–65, 102–103. Third, Craig did not respond to their alleged complaints and met with Engelhart and Reitz only because Mendenhall sent them to meet with him. Tr. 438–439.

[13] I did not credit the testimony of Craig and Wendell that Craig asked Engelhart and Reitz if they were going into other departments and "telling them about this pizza thing." Tr. 268, 440. As explained in the preceding footnote, the meeting was held at Mendenhall's request concerning disruption in the coin vault work area.

[14] I base this finding on the credible testimony of Reitz and Engelhart. Tr. 36–40, 103–106. Their contention that Craig told them to stop any further discussion of the pizza tip issue was corroborated by his testimony that he told them to "stop." After a brief pause, he changed his testimony to "stop disrupting," but it was clear he did not want them to discuss the incident anymore, anywhere. Tr. 440–442. Wendell also corroborated their testimony by recalling that Craig's directive included a remark "that it should not be talked about. From then, that day forward nothing was to be said." Tr. 268–269. "It" was clearly a reference to the pizza tip incident. Regarding the alleged termination threat, I credited the testimony of Misty Boiano, a credible witness, that Engelhart told her this immediately after the meeting. Tr. 178.

[15] Craig acknowledged this fact. Tr. 442.

[16] I based this finding on the collective testimony of Engelhart, Reitz, Boiano, and Mendenhall. Engelhart and Reitz testified regarding Mendenhall's surveillance after the Craig meeting. Tr. 42–44, 106–109. Boiano testified, however, that Mendenhall came out of his office a lot more than he used to, but to tell employees they were talking too loud. Based on her credible testimony and, given the fact that Engelhart was an admitted loudmouth, I did not credit this portion of Engelhart's assertion that Mendenhall stared at her as she worked silently at her desk. Tr. 106–107. Mendenhall, on the other hand, generally denied a leading question as to whether he placed them under surveillance, but admitted observing them speak with other employees outside their work areas about the pizza tip incident. Given that the fact that he only learned about the issue from Lynch and Wendell *before* the meeting with Craig, it is clear that he followed and observed them after the pizza tip incident. Tr. 231–233, 238.

[17] There was consistent testimony regarding the June–July staffing situation by Armstrong, Mendenhall, Reitz, and Engelhart. Tr. 48–50, 182–183, 213–214. The Respondent had the opportunity to introduce documentary evidence that the previous witnesses were incorrect on this point when it called Donna Wendell, the department manager. However, she merely testified that there was full production in her department through June 23 or 24, a claim contradicted by Armstrong. Tr. 278.

[18] I found this portion of Engelhart's testimony more credible than Lynch's version. There can be no doubt that Engelhart wanted the month of June off and let coworkers and Lynch know about it from day one. She was clearly an outspoken person and her evaluations confirm that she did not hold much back. Tr. 94–97, 163; GC Exh. 6. Lynch, on the other hand, did not provide any details of her initial interview of Engelhart and merely denied promising at that time that she could take off a month. Tr. 346.

[19] I did not credit Engelhart's assertion that she periodically told Lynch about her vacation after August because she was too combative and evasive when cross-examined about those occasions.

[20] GC Exh. 6.

of May 2 in which Engelhart told Lynch that she needed to take off the month of June to visit her brother. As a part-time employee, Engelhart was not eligible for a paid vacation, but was eligible for authorized leave without pay. Since the request involved a significant period of time, however, Lynch told Engelhart that they were very busy and she could not take a month off. Engelhart then went to speak with Wendell, the department manager, and renewed her request. Wendell told her that an entire month off was too long and Engelhart replied that she always took off the month of June to travel. Wendell responded that the Respondent "did not give anybody a month off" and the discussion ended.[21]

During the week of May 9, Engelhart again asked Lynch about taking a month off in order to see her brother. Lynch asked Engelhart whether something was wrong with her brother and the latter said no. At that point, Lynch told her to speak with Wendell. Engelhart then approached Wendell with the leave request, telling her that she needed the time to care for her ill brother. Wendell told Engelhart that, since she had been employed by the Respondent for less than 1 year, she did not believe that Engelhart would be covered under the Family and Medical Leave Act (FMLA). However, she told Engelhart to check with Lisa Steffenson, a human resources administrator.[22]

Engelhart then went to speak with Steffenson. Engelhart told Steffenson, whom she had never met before, that she needed a month off to visit a relative. After Steffenson told her that the Respondent does not permit month-long vacations, Engelhart explained that she needed the time to visit an ill brother in another State. Steffenson responded that the Respondent had a policy against granting such a long leave of absence, but that such a situation might be grounds for family medical leave.[23] In fact, even though it has put other policies into writing, at the time of Engelhart's meeting with Steffenson, the Respondent did not have one regarding leaves of absence by part-timers. Aside from FMLA considerations, it dealt with leave requests on a case-by-case basis.[24]

After reviewing written materials, Steffenson informed Engelhart that she did not qualify under the FMLA because she had not worked for the Respondent for at least a year and a brother did not qualify as a family member within the meaning of that law. Engelhart complained that it was not fair that her leave request be denied because other part-time employees had been given time off. Steffenson told her that the Respondent could not grant leave for an entire month, particularly in the summer, because then everyone would want the time off and the Respondent would be left short-staffed. Steffenson also explained that she was not aware of any other instances where a part-time employee was permitted to take off an entire month. Engelhart responded that she would just file for unemployment compensation benefits.[25]

On May 18, Engelhart went to Mendenhall's office, told him about her unsuccessful discussions with Lynch, Wendell and Steffenson, and asked if there was anything he could do. Mendenhall, who clearly had the authority to authorize the leave request, replied that he would follow the human resource policy.[26] Engelhart asked why, and he replied that she "had some issues of late." Engelhart replied, "Oh, it's about the Ira issue" and Mendenhall responded, "well it's only been a couple of weeks." He told Engelhart he would get back to her and the conversation ended.[27] The following day, Engelhart told Zeno that she was stressed out, needed some time off, and was not feeling well. She also told Zeno she made an appointment with her doctor in order to get time off from work.[28]

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[21] I based this finding on the credible testimony of Lynch and partly on the testimony of Wendell. I was not impressed with the consistency of Wendell's testimony at various points, but on this issue, she and Lynch were fairly consistent. Both witnesses testified that Engelhart came to them during the first week on May and again less than a week later. Tr. 271–272, 345–347. The following week was the week of May 9 because that is the date Engelhart went to see Steffenson in human resources. Tr. 384. Engelhart, on the other hand, was not credible on this point. She insisted that the she did not have discussions about her leave request with Lynch and Wendell prior to the week of May 9, but conceded on cross-examination that she "had her doubts" before that time. Tr. 110, 137.

[22] The testimony of Lynch and Wendell regarding this second set of conversations regarding the leave request was more credible than Engelhart's version. Tr. 272, 346–348, 371–372. Engelhart's testimony omitted any reference to a conversation with Wendell prior to the week of May 9. More importantly, I did not credit Engelhart's assertion that Lynch suggested she lie about the need to travel to Colorado because her brother was ill. Tr. 110–111. By then, Lynch was already concerned with Engelhart's attitude and performance, and it would be ludicrous to believe she would have, at that point, gone out on a limb for Engelhart. *See* Lynch's April evaluation of Engelhart, dated May 10, in which she rated Engelhart average in the attitude category and satisfactory in all other categories. Lynch also commented that Engelhart "let too many outside issues [affect] job performance." GC Exh. 6.

[23] I base the finding regarding this meeting mostly on Steffenson's testimony. As discussed below, Steffenson had credibility issues. Nevertheless, Engelhart denied mentioning her brother in this meeting, but conceded that Steffenson consulted the Respondent's FMLA policy. Tr. 168–171, 293–297.

[24] Steffenson's testimony revealed the existence of virtually no leave guidelines for part-time employees. She conceded that part-timers' leave requests were dealt with on a case-by-case basis and that the reapplication policy only applied to employees on leave longer than 30 *workdays.* Tr. 306. Steffenson also explained that she merely "discussed it" (the leave policy) with Craig and John Armstrong, and even then could not recall when such a discussion took place. The best she could do was estimate that such a rule was discussed "after the first of the year." Tr. 313–315. Craig, meanwhile, could only say that he and Steffenson would "bounce" ideas off on each other. Tr. 443-444.

[25] Engelhart and Steffenson were fairly consistent as to their versions of this conversation and I credited portions of their testimony in reconstructing the facts. Tr. 112–114, 296–297, 310–312.

[26] Mendenhall's reference to Jake Drukenbrod as an example of an employee who took a leave of absence and was made to reapply was not, in fact, comparable to the type of leave sought by Engelhart. Drukenbrod resigned in order to attend college in Columbus, but returned after a semester and reapplied. Tr. 228–229.

[27] I credited mostly Engelhart's account of this conversation because Mendenhall seemed to have a limited recollection of the entire conversation. Her account was also more consistent with her confrontational approach. Tr. 115–116, 143–144, 226–231.

[28] Zeno was a very credible witness. Her testimony was equally as spontaneous and responsive on cross-examination as it was on direct examination. Tr. 400–402. It was also not refuted by Engelhart during her rebuttal testimony.

The Doctor's Note

On May 20, Engelhart went to Tri County Medical Services, Inc. in Hartville, Ohio. She was seen by Tom Gibbs, D.O. Engelhart told Dr. Gibbs that she was "not feeling right," was having difficulty sleeping at night, and did not think her current medication was strong enough. Engelhart also shared her dilemma regarding the Respondent's refusal to grant her a 1-month vacation. Dr. Gibbs accepted Engelhart's subjective complaints at face value, diagnosed her with anxiety/depression, and increased her dose of antidepressant medication. He also accommodated her desire for time off from work by giving her a "Certificate to return to work or school" (doctor's note). The doctor's note stated that she "has been under my care from 5/20/05 for the treatment of illness and is able to return to work/school on 7/1/05." The "remarks" section of the doctor's note was left blank and a scribbled, illegible signature was written at the bottom. There was no other indication on the note as to the name of the doctor and no followup visits were scheduled.[29]

On May 23, Engelhart returned to work with the doctor's note. She encountered Zeno in the hallway. Zeno asked why she was there and Engelhart replied that she was bringing Wendell a doctor's note because they would not give her the time off.[30] Engelhart then gave the doctor's note to Wendell, who informed her that she would still have to resign and reapply when she returned in July. Engelhart insisted she was not resigning and would see Wendell on July 1. Wendell brought the medical note to Steffenson later that day. In light of the shifting reasons given by Engelhart as to the need for a month off from work, Steffenson was suspicious that it was not a legitimate medical excuse.[31]

After consulting with Craig, Steffenson took no further action regarding Engelhart or the doctor's note. Later that day, Engelhart telephoned Craig and asked if she was fired. Craig asked what she meant. Engelhart then explained that she gave Wendell a doctor's note justifying time off from work until July 1 and asked again whether she was fired. Having spoken earlier with Steffenson, Craig asked Engelhart how long she had worked for the Respondent. After Engelhart told him she had worked there less than a year, he replied that she needed to be employed a year to qualify for authorized leave pursuant to the FMLA. He also told her that the Respondent did not have a policy of granting leaves of absence for periods of 5 or 6 weeks, but added that she was "welcome to reapply."[32]

Events Post-May 23

On May 28, Engelhart signed and submitted an unfair labor practice charge to the Board. The charge, which was filed June 7, stated:

> The Employer by its agents and or representatives violated Section 8(a)(1) of the Act when it retaliated against Maggie Engelhart on or about May 16, 2005 and May 23, 2005 for engaging in protected concerted activity when it informed her that if she took medical leave she would have to reapply for her position.[33]

In June, after the charge was served, Wendell filled out a transaction form indicating that Engelhart resigned and forwarded it to Steffenson. Steffenson, however, did not sign the form because it was generated after the charge was filed.[34]

After the charge was filed, Engelhart left for Colorado and stayed there for the rest of the month.[35] At 10:45 a.m. on July 1, she arrived at the Respondent's new facility on Everhard Road and told the receptionist that she was reporting for work. The receptionist asked Engelhart to wait as she made a telephone call. A few minutes later, two security guards appeared. One of them handed Engelhart a job application and requested that she complete it. Engelhart questioned why she needed to fill out an application if she did not resign and demanded they get someone with authority. One of the guards made a tele-

[29] This was one of Engelhart's less credible moments. She denied telling her doctor that she had an ulterior motive of getting medical support for time off from work. It is clear, however, that Engelhart manipulated the doctor to provide her with a medical excuse supporting her quest. The doctor's note prescribed time off from work from the date of the visit through July 1—a period of approximately 6 weeks, but provided no explanation or justification for that recommendation in the medical record. It is obvious that he was accommodating her request. Tr. 116–120, 149–152; GC Exh. 3; R. Exh. 3.

[30] Zeno's testimony on cross-examination indicated that she spoke with Engelhart about her medical excuse on two occasions. Tr. 410–413.

[31] I credited Engelhart's contention that she handed the medical note to Wendell and left because Wendell's testimony was very inconsistent on this point. Wendell initially testified that she told Engelhart to take it to Steffenson, but then she thought she gave it to Steffenson and, finally, settled on the belief that Engelhart took it to Steffenson. Steffenson, on the other hand, testified that Wendell brought the doctor's note to her and she was suspicious of the medical reasons stated. Tr. 120–121, 273–275, 280–283, 297–298, 313. Notwithstanding all of the inconsistencies surrounding the testimony of Wendell and Steffenson, it was not only reasonable, but logical, that management would be skeptical of the doctor's note, given the myriad of explanations that Engelhart gave over the course of several weeks in trying to get a month off from work.

[32] I primarily based this finding on Craig's testimony. I found it credible that Steffenson checked with him about her decision not to grant Engelhart's leave request and that he concurred with it before Engelhart called him. Engelhart testified that Craig told her that he was unaware of Steffenson's denial of the leave request and would get back to her. That assertion was not credible because Engelhart treated the conversation as one that brought finality to her tenure with the Respondent. That was evident from the fact that she filed charges with the Board 5 days later. Tr. 121–122, 444, 466–447; GC Exh. 1(a).

[33] GC Exh. 1.

[34] The circumstances surrounding the transaction form are somewhat suspicious. Wendell apparently generated the transaction form after the charge was filed and sent it to Steffenson. Steffenson's reaction in not signing it leads me to infer that Wendell generated the form in response to the charge and not in the ordinary course of business. Tr. 302–304; R. Exh. 6.

[35] I sustained a hearsay objection as to what Engelhart's doctor allegedly told her over the telephone in June. Had I allowed it, I would not have credited it, as Engelhart's testimony was largely devoid of credibility after she submitted the questionable doctor's note. Tr. 122–123. The date that she signed the charge (May 28) and its filing date (June 7) warrant an inference that she stayed around until the charge was filed and not because she needed medical clearance to travel.

phone call to Craig. Craig then summoned Hemmingway to his office and told him that "she is no longer to come to the door, and you can give her an application. And she's more than welcome to fill it out." Hemmingway proceeded to the reception area, picked up an application, and attempted to hand it to Engelhart. She again questioned why she needed to complete one since she had neither resigned nor been terminated. Hemmingway explained that this is what he was authorized to do. Engelhart refused the take the application and said, "[y]ou'll be hearing from my lawyers and especially you, Ira Malcolm Hemmingway," and left.[36]

The Respondent's Written Policies

During Engelhart's tenure with the Company, the Respondent had certain written policies in effect. Its corporate policies, dated March 10, 2003, were acknowledged in writing by Engelhart when she was hired on August 25 and placed in her personnel file. They included a bereavement policy, workplace violence prevention policy, a policy prohibiting related employees from working in the same department, and workplace injury or accident notification procedures. The policies further states that "[u]npaid leave may be available for employee associates not eligible for paid bereavement leave." The amount of time of paid leave is 3 business days. Eligibility is limited to "full time employee associates that have completed three months of continuous regular service."[37]

On January 13, the human resources department issued a memorandum to "all hiring managers/supervisors" regarding "vacation/personal time." It laid out a policy for vacation and personal leave for *full-time* employees:

> Some clarification on vacation and personal time.
>
> If you are full-time, your vacation starts one year after your hire date, whether that hire date was a full or part time hire date. Vacation can be taken in full or half-day increments. One week of vacation time is five days. You have one year after your anniversary date to use your vacation time, as it will not carry over to the next year.
>
> We recognize that at times, matters come up that cannot be handled while you are at work; therefore you are entitled to two personal days per year. If you are hired after June 30th, you will be granted one personal day. Personal days start in January and end in December. Personal days do not carry over into the next year if not taken. Personal days may also be taken in full or half-day increments.
>
> Please be sure to fill out a transaction form for any days off, within the same period that the days are taken, and forward to Lisa for processing. She will then forward to payroll.
>
> Any questions please see Mark or Lisa.

The Respondent's Administration of Leave Requests By Part-time Employees

While the Respondent had a vacation and leave of absence policy for full-time employees, it did not have one for part-time employees. Such requests were addressed on a case-by-case basis, unless they involved maternity leave or family medical leave. Maternity leave is covered by the Pregnancy and Employment Discrimination Act (PEDA), while family medical leave is covered by the FMLA. If an employee is covered under that FMLA, they are eligible for up to 13 weeks of unpaid leave. FMLA coverage requires, however, that an employee be at his place of employment for at least 1 year.[38] If a request did not fall under either the PEDA or FMLA and was greater than 30 *working* days, the employee must reapply.[39] This practice contrasted with the statements made by Lynch, Wendell, and Steffenson to Engelhart regarding her request for a *month-long* leave of absence. Engelhart requested time off for the month of June, which contains less than 30 workdays.

Prior to May, the Respondent granted leaves of absence to part-time employees for periods of a week or more. In none of these instances were employees required to reapply. Alice Flanagan was granted a leave of absence from December 7 to January 4, or a total of 17 workdays. Nancy Putt was granted a leave of absence from December 16 to January 4, or a total of 8 workdays. In March, Engelhart was granted a 1 week leave of absence.[40] Nor was a transaction form filled out by either the employee or supervisor. However, that was not unusual, since the Respondent did not establish a policy requiring the completion of such forms until sometime in the spring of 2005.[41] On February 17, Torri Petrovski was granted a leave of absence for surgery. The leave was from February 18 to March 18 "or sooner by [doctor's] release." The transaction form indicated she was on "unauthorized time off."[42] There was also another instance where an employee, Tammy Pease, was granted maternity leave on July 1, 2003, with an indication in the transaction form that she would return in approximately 6 weeks.[43] This transaction was covered by PEDA.

There were instances in which two former legal department employees reapplied for employment with the Respondent. Their circumstances, however, were vastly different from a request for 30 days off from work. Jason Yost previously worked as a law clerk for the Patent Health part of the Company from October to December. However, the resignation of Yost, a CPA, coincided with his graduation from law school and he left to work for an accounting firm. He was rehired by the Respondent as a legal department employee on April 11. The transaction form was silent as to the basis for his separation from the Company (voluntary quit, discharge or layoff).[44] Also,

[36] Engelhart's testimony, especially on cross-examination, corroborated Hemmingway's version of this transaction. Tr. 126–128, 158–159, 162–163, 428–430.

[37] GC Exh. 6.

[38] Tr. 306–308.

[39] Steffenson conceded this important distinction between 30 working days and 30 calendar days. Tr. 314, 322.

[40] GC Exh. 2; Tr. 193–194, 274, 354.

[41] Steffenson testified that it was "hit or miss" as to whether transaction forms would be filled out. Tr. 298–302; R. Exh. 10.

[42] GC Exh. 4.

[43] GC Exh. 5.

[44] The transaction form indicates that he never worked for "Unisyn" before, but the resume clarifies that he was employed by Patent Health.

John Marshall, a part-time law clerk, either resigned or was terminated on September 17 and rehired as a law clerk on May 23.[45]

Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when: (1) Craig informed certain employees they would be terminated if they continued to discuss the pizza tip incident with other employees; (2) Craig and Mendenhall subjected Engelhart to surveillance because she discussed the pizza tip incident with other employees; and (3) it terminated Engelhart on May 23 because she and Reitz complained about the pizza tip incident. The Respondent denies such threats or surveillance and contends it merely directed Engelhart and Reitz to stop disrupting work operations. More importantly, it asserts that the discussion over the pizza tip incident did not constitute protected concerted activity.

Under Section 8(a)(1), it is an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." To find an employee's activity to be concerted, "it must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497, revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). Furthermore, the activity must relate to potential group action or the bringing of group complaints to the attention of management. In other words, there must be evidence that the employee "at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor." *Meyers Industries (II)*, 281 NLRB 882, 886–887 (1986).

There is no question that Engelhart and Reitz engaged in concerted action. They joined together to urge other employees to call Fox Pizza regarding the pizza tip incident and brought their complaint to management's attention. *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984). The crucial inquiry is whether such activity was protected under the Act. In order for concerted activity to obtain the protection of Section 7, employees must show they were engaged in activities for their "mutual aid and protection." The Supreme Court has liberally construed the "mutual aid or protection" clause of Section 7 to include concerted activities by employees "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Eastex, inc. v. NLRB, 437 U.S. 556, 565 (1978). "[I]f they might reasonably be expected to affect terms or conditions of employment," concerted activities are protected by Chapter 7. *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981) (per curiam). In that regard, the Supreme Court long ago established that employees' activities are protected when, as a concerted protest, they refuse to work in what they perceive to be unsafe or uncomfortable conditions. *NLRB v. Aluminum Co.*, 370 U.S. 9 (1962).

[45] There is no documentary proof that he was terminated on September 17, 2004, but no one questioned this testimony. Tr. 199.

The Board has found, as the General Counsel suggests, activity relating to employees' lunchbreaks to be protected activity. However, these cases are quite dissimilar. In *Accel, Inc.*, 339 NLRB 1052, 1056 (2003), and *P. B. & S. Chemical Co.*, 224 NLRB 1 (1976), and *SDC Investment*, 299 NLRB 779, 785 (1990), employees complained about the denial or time change of a regularly scheduled lunchbreak. Here, on the other hand, there is no claim that the Respondent was involved in the voluntary arrangement that Engelhart and others had with Hemmingway. Nor does this case involve complaints about managerial misconduct. In *Hoytuck Corp.*, 285 904 (1987), employees attempted to circulate a petition seeking the firing of a supervisor for cursing employees in front of customers. Here, however, there is no claim that Hemmingway's actions were intertwined with employees' work conditions. In *Georgia Farm Bureau Mutual Insurance Co.*, 333 NLRB, 850, 851 (2001), insurance agents, subject to termination if they became aware of fraudulent activity and failed to report it, reported fraud by a supervisor. Also, in *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 784 (6th Cir. 2002), an employee circulated a petition among other employees calling for the removal of certain supervisors because they mishandled funds, terminated needed employees, and used company funds to thwart union activity. There is no proof here that Hemmingway's conduct had any effect on or threat to the Respondent's property.

The Respondent's cited cases of unprotected conduct also fail to reveal similar fact patterns, but provide general insight regarding the concept of "terms and conditions of employment." *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464, 476–477 (1953) (employee circulated fliers criticizing quality of employer's broadcasts); *Vemco, Inc. v. NLRB*, 79 F.3d 526 (6th Cir. 1996) (employees left workplace for reasons unrelated to their working conditions); *New River Industries v. NLRB*, 945 F.2d 1290, 1295–1296 (4th Cir. 1991) (employees sent letter criticizing management about the value of a one-time gift); *Orchard Park Health Care Center*, 341 NLRB 642, 643–644 (2004) (nurses called Health Department hotline regarding the quality of care of patients); *HCA Health Services of New Hampshire, Inc.*, 316 NLRB 919, 920 (1995) (employee spread false rumors relating to a personal dispute with her supervisor); *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 1821 (1992) (employees distributed literature promoting a stock option plan to purchase half-ownership of the employer's parent company); *Honda of America Mfg.*, 334 NLRB 746, 747 (2001) (employee distributed newsletter implying that a coworker was a homosexual).

In the literal sense, it is reasonable to construe an employee's communication as coming to the "mutual aid and protection" of other coworkers when she informs them that a security guard is stealing or misappropriating their money at work. On the other hand, Engelhart, Reitz, and other employees voluntarily gave tip money to Hemmingway. Hemmingway was supposed to deliver the money to the pizza delivery person. Essentially, Engelhart and Reitz were complaining to coworkers about their personal arrangement with Hemingway. Under Ohio law, a gratuitous bailment was created when Hemmingway, without compensation, accepted the tip money for the purpose of passing it on to the pizza delivery person. 7 Ohio Jurisprudence 2d

110, Bailments, Section 4. On that basis, the employees may have sought monetary relief in the local court. *Sandlin v. First National Bank of Cincinnati*, 20 Ohio App.2d 200, 203 (Ohio App. 1969). It did not amount to theft in the workplace.

Assuming, *arguendo*, Hemingway's conduct amounted to theft in the workplace, the Respondent may have had a legitimate interest in the matter. In *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999), the Board held that "concerns about petty cafeteria theft" do not pose an "apparent threat to employee or public safety" and do not carry the same "unusually great weight" as an employer's interest in employee illegal drug use. Nevertheless, the Board noted that workplace theft is a legitimate and substantial employee safety consideration. That case, however, involved the issue of an employer's duty to bargain pursuant to Section 8(a)(5), and it would be a stretch to equate an employer's possible interest in preventing petty cafeteria theft with employees' conditions of employment.

The Respondent was essentially detached from the lunch-ordering arrangement that the pizza group had with Hemmingway. The Respondent's only involvement was that it provided employees with a 1/2 hour lunchbreak. The testimony indicated that having lunch delivered was a benefit to employees because 1/2 hour was not much time to go out for lunch. That was a reasonable observation, but there was nothing to prevent employees from brown-bagging their lunch or having someone other than Hemmingway collect the money and process the food order. Under the circumstances, Engelhart's discussion of the pizza tip incident did not amount to protected activity, a necessary component in establishing a Section 8(a)(1) prima facie case. Therefore, all causes of action in the complaint are fatally flawed.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Maggie Engelhart's discussion of the pizza tip incident did not constitute concerted protected activity and, therefore, the General Counsel did not prove, by a preponderance of the evidence, that the Respondent threatened Engelhart, placed her under surveillance, and terminated her in violation of Section 8(a)(1) of the Act.[46]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 10, 2006

[46] The dismissal of the charges due to the failure to prove protected concerted activity renders it unnecessary to reach any further conclusions. Nevertheless, should the Board disagree with my conclusions, the findings of fact address all elements of the charges and provide the Board with a basis to render an alternative decision on the merits.

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.